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Nineteenth session

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OF THE 43rd MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 25 November 1998, at 11.10 a.m.

Chairperson: Mr. ALSTON

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* The summary record of the first part (closed) of the meeting appears as document E/C.12/1998/SR.43.

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The public part of the meeting was called to order at 11.10 a.m.

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 3) (continued)

Draft general comment No. 9: The domestic application of the Covenant

1. The CHAIRPERSON stressed the need for the Committee to adopt more general comments. Aside from the draft about to be considered, there were other, shorter, general comments on benchmarks, the role of national institutions and the right to food respectively, which he hoped to submit for discussion during the current session. Turning to the draft general comment before the Committee and speaking in his personal capacity as its author, he apologized for the highly legal nature of the text. Its purpose was to explain the main issues relating to the status of the Covenant in the legal order of States parties - a problem which frequently arose in the Committee's work. The text was fairly conservative in tone and would, he hoped, go some way towards closing the gap between theory and practice as regards the application of the Covenant in domestic legislation. It was available only in English and read as follows:

> "1. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized. By requiring Governments to do so 'by all appropriate means', the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.
>
> "2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the norms themselves must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.
>
> "3. Questions relating to the domestic application of the Covenant must be read in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties 1969, is that 'States must ... modify the domestic legal order as necessary in order to give effect to their treaty obligations'. The second is reflected in article 8 of the Universal Declaration of Human Rights, according to which 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' The Covenant contains no direct counterpart to article 2 (3) (b) of the International Covenant on Civil and Political Rights which obligates States parties to, inter alia, 'develop the possibilities of judicial remedy'. Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of article 2.1 of the Covenant, or that, in view of the other means used, they are unnecessary.

"(a) The place of the Covenant in the domestic legal order

"4. Ideally, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals concerned to seek enforcement of their rights before national courts and tribunals. Even if international procedural mechanisms exist for the pursuit of individual claims, they cannot be seen as effective substitutes for the protection afforded by national courts and tribunals which, by and large, tend to be both more accessible and more effective. In the absence of a petition procedure, the International Covenant on Economic, Social and Cultural Rights is all the more dependent upon the provision of remedies at the national level.

"5. The Covenant itself does not stipulate the specific means by which its terms are to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any particular status in national law. Since the obligation to implement the Covenant is thus one of result, the precise method by which Covenant rights are given effect in national law is within the discretion of each State party, subject only to the stipulation that they be implemented in good faith.

"6. An analysis of State practice with respect to the Covenant shows that States have used a variety of means for implementing its terms. Some States have 'transformed' the Covenant into domestic law by supplementing or amending existing legislation and without invoking the specific terms of the Covenant. Others have 'adopted' or 'incorporated' it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. Differences in the approach of States to the Covenant depend significantly upon the approach adopted to treaties in general.

"7. But whatever the preferred methodology, several principles must be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability where appropriate (see paragraph 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant Rights. Secondly, account must be taken of the means which have proved to be most effective in the country concerned to ensure the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, a compelling justification should be available. Any such analysis would need to take account of the fact that while some of the Covenant's provisions are more clearly 'programmatic' than those of some other treaties, many of the Covenant's provisions are directly comparable in nature to those contained in treaties dealing with civil and political rights.

"8. Thirdly, while the Covenant does not formally oblige States to incorporate its provisions into domestic law, such an approach is

certainly desirable. Direct incorporation avoids problems that might arise in the 'translation' of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For those reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law..

"(b) The role of legal remedies

"9. *Legal or judicial remedies*? The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely, and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

"10. *Justiciability*. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus in General Comment No. 3 it cited, by way of example: articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), 13 (3), 13 (4) and 15 (3). It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that all matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent.

"11. *Self-executing*. The Covenant itself does not negate the possibility that the rights may be considered self-executing. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant providing that it be considered 'non self-executing' were strongly rejected. In most States the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties that are regularly deemed by courts to be self-executing.

"(c) The status of the Covenant in domestic courts

"12. The Committee's guidelines for States' reports request States to provide information as to whether the provisions of the Covenant 'can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities'. Some States have provided information but greater importance should be attached to this element in future reports.

"13. On the basis of available information, it is clear that State practice is mixed. The Committee notes with appreciation that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

"14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Abdication by the courts of this responsibility is incompatible with the principle of the Rule of Law which must always be taken to include respect for international human rights obligations.

"15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter."

2. Mr. RIEDEL said that the draft text provided a good working basis for the Committee's discussion. The Committee might also wish to give some consideration during the present session to the possibility of changing the

current format of general comments. The text before the Committee was medium length, while other general comments had been longer, which could sometimes prove off-putting for readers. Perhaps the Committee might consider the idea of shorter comments in future to clarify matters of concern that frequently cropped up in its work, together with longer commentaries on the different articles of the Covenant, which would be particularly useful for new Committee members.

3. Ms. JIMÉNEZ BUTRAGUEÑO observed that there could be no hard and fast rules on the length of general comments: some issues, such as the rights of the disabled, required more detailed explanation and thus longer texts.

4. Mr. TEXIER underlined the usefulness of the draft comment before the Committee. In the light of the Committee's decision to draft an optional protocol to the Covenant, any text which served to define more clearly the justiciability of economic, social and cultural rights and the need to place them on an equal footing with civil and political rights was most welcome.

5. Recently he had taken part in a meeting of a group of experts convened by the Food and Agriculture Organization (FAO) at which representatives of FAO and the Office of the High Commissioner for Human Rights had stressed the need for the Committee to adopt a general comment on the right to food without further delay. He was aware that Mr. Alston was currently working on a contribution provided on the subject by a specialist non-governmental organization (NGO) Foodfirst Information and Action Network (FIAN). It would be ideal if the Committee could adopt a general comment on the right to food during the current session, particularly to provide input to the High Commissioner for a human rights meeting scheduled for April 1999. Failing that, however, he hoped that the Committee would at least be able to prepare the ground for its adoption at the next session.

6. The CHAIRPERSON endorsed the comments of Mr. Riedel and Ms. Jiménez Butragueño concerning the need for longer and shorter texts to meet specific requirements. He hoped to submit an abridged version of the NGO's text to the Committee in the coming days, as a working basis for a draft general comment on the right to food.

7. He invited comments on the structure and basic thrust of the draft general comment before the meeting.

8. Mr. PILLAY said that the judiciary were often criticized for not giving effect to the rights enshrined in the Covenant when in fact they were not to blame. One problem was that in States parties with an Anglo-Saxon legal system treaties were not self-executing, their provisions having to be incorporated in domestic legislation before they could be invoked in the courts. In that connection he endorsed the thrust of paragraph 8 of the draft text. The problem was exacerbated in countries like Mauritius, where there was a right of final appeal to the Privy Council, which more often than not would find that the Supreme Court was going too far in referring to provisions that did not form part of domestic legislation. It was first and foremost the responsibility of the Government of the State party which had ratified the treaty to devise the most effective means of implementing its provisions.

9. Such problems could not be resolved through the administrative remedies. It was traditionally the role of the judiciary to assist citizens in upholding the rights protected by treaties under which the Government had contracted obligations, though it might not necessarily always comply with them. The difference between civil and political rights and economic, social and cultural rights was that the former were usually enshrined in the Constitutions of States parties or incorporated in domestic legislation and were thus given effect in the courts of law.

10. Mr. CEVILLE said that even in countries with a Roman legal system the practice was not to apply provisions unless they had been incorporated into domestic law. Emphasis must therefore be placed on the need for States parties to incorporate the provisions of the Covenant into their domestic legislation, rather than simply leaving it to the courts and Governments to apply those provisions at their discretion.

11. Mr. TEXIER said that the draft general comment, the content of which he wholeheartedly supported, represented an ideal that many countries would find hard to live up to. In France, for example, the Court of Cassation had ruled in a number of cases that the provisions of the Convention on the Rights of the Child were not self-executing and that, while they obliged the Government to take certain legal or administrative measures, they were not directly binding on judges. That was a key problem in many countries. The fact that the draft general comment stated that economic, social and cultural rights were directly applicable would oblige States parties to alter their approach to the matter. The draft general comment also took a clear stance on a number of other issues upon which the Committee had hitherto hesitated to pronounce: for instance, by asserting in its paragraph 5 that the obligation to implement the Covenant was one of result, it clarified the Committee's position on a question that had been the subject of heated debate for some 30 years. Once adopted, the draft general comment would enable the Committee to engage systematically in a dialogue with reporting States concerning their case law, and would also serve as a valuable tool for those whose task it was to administer justice in the States concerned.

12. Mr. CEAUSU said that the fact that the draft text took up, and elaborated on, ideas already developed in General Comment No. 3 might give rise to speculation concerning the relationship between the two texts. Perhaps there might be a case for preparing a revised text of General Comment No. 3, to incorporate the new ideas set forth in draft general comment No. 9.

13. The CHAIRPERSON said that it might be wise to state, in an introductory first paragraph, that in its General Comment No. 3 the Committee had addressed the broad issue of domestic application, whereas the present general comment was designed to elaborate on certain specific aspects of that issue.

14. Mr. SADI felt that the preparation of a revised text of an existing general comment would create a bad precedent. General Comment No. 3 should not be amended, but supplemented through the adoption of a new general comment.

15. Mr. RIEDEL said that the gist of General Comment No. 3 was substantive, whereas draft general comment No. 9 addressed the procedural aspects of the question of domestic application.

16. Ms. JIMÉNEZ BUTRAGUEÑO supported the proposal to add an introductory paragraph clarifying the relationship between the two general comments. Consideration must also be given to how States parties could best be prevailed upon to take proper note of the Committee's general comments.

17. Mr. KOUZNETSOV said he had received the text of the draft general comment only the day before, in an English-language version. His first impression was that it fully reflected its author's wealth of experience and professional competence. Nevertheless, the general comment as finally adopted would be a text of the Committee as a whole. Consequently, following a first reading, more time should be devoted to detailed consideration of the document in all the working languages, so as to enable members of the Committee collectively to improve its substance.

18. The CHAIRPERSON said he acknowledged that to attempt to complete a first reading of a text not yet available in all working languages might pose problems for some members. If there was general reluctance to proceed in that fashion, he would defer to members' feelings. However, he hoped that, with the assistance of the interpreters, it would prove possible to embark upon a paragraph-by-paragraph consideration of the text at the current meeting, while awaiting the issuance of a text in all working languages, which could be considered the following week.

19. Mr. SADI said that the whole question of domestic application of the Covenant needed to be clarified as a matter of urgency. If any progress was to be made with reporting States on the question, every effort must be made to adopt draft general comment No. 9 at the current session.

20. Mr. KOUZNETSOV said he was more than happy to embark immediately on a first reading of the draft general comment, prior to its more detailed consideration and possible adoption the following week.

21. Mr. TEXIER endorsed Mr. Sadi's remarks concerning the urgency of the matter, and supported the Chairperson's proposed method of proceeding.

22. Mr. RIEDEL endorsed Mr. Sadi's and Mr. Texier's comments. Because States parties had such a variety of means at their disposal for accepting their obligations under the Covenant, the Committee's questions on the first sections of their reports tended to lack focus. In the case of the European Convention on Human Rights, States that had originally declined to accept the immediate domestic applicability of that instrument had found, with the passage of time, that their national sovereignty was not unduly affected by adherence to that treaty. The same might prove true of the Covenant, if in general comment No. 9 the Committee were to call on States to review their attitudes towards implementation, adoption or incorporation of their obligations.

23. Mr. PILLAY endorsed Mr. Sadi's comments. A case in point was Canada, where provisions of the Covenant were regularly invoked as if they had been

incorporated into domestic law, but could be contested in the courts by State representatives. Such a situation was in clear conflict with the requirement stipulated in paragraph 15, and only highlighted the need for draft general comment No. 9 and the importance of approving it as soon as possible.

24. Ms. BONOAN-DANDAN agreed with Mr. Riedel that the differences in the approaches of States to the Covenant had caused the Committee to become increasingly tentative in discussions on the status of the Covenant in their domestic legislation. She was confident that, once approved, general comment No. 9 would help redress that situation.

25. The CHAIRPERSON invited the Committee to examine the draft general comment on a paragraph-by-paragraph basis. He took it that, in the light of the discussion which had taken place, the Committee would wish a new preliminary paragraph to be included, worded along the lines:

> "In its General Comment No. 3, the Committee addressed questions relating to the nature and scope of State party obligations. In the present general comment, the Committee seeks to develop further some aspects of the issues addressed in its earlier statement."

Paragraph 1

26. Mr. MARCHÁN ROMERO said that the first sentence, "The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized." was incomplete. Recognized by States or in the Covenant?

27. The CHAIRPERSON suggested adding the words "in the Covenant" after "recognized".

28. Mr. PILLAY suggested adding "therein" rather than "in the Covenant".

29. The CHAIRPERSON said he believed that would solve the problem to the Committee's satisfaction.

30. Mr. CEAUSU observed that the formula "to give effect to the rights" was more forceful than the wording used in the Covenant, "to achieve full realization of the rights".

31. The CHAIRPERSON said that the earliest texts in the General Comments series, which had been drawn up by the Human Rights Committee, had on legal advice contained very little wording that did not already appear in the Covenant. Over time, it had proved more useful for the Committee to use its own formulations to render the legalistic language of the Covenant. That was the spirit in which he had written the present paragraph. The alternative would be to reproduce the whole of article 2.1. His intention had been to find a general formula that avoided technical and legal connotations, and could not be contested.

32. Mr. RIEDEL felt that the phrase "to give effect to" was less open to interpretation and more to the point than the wording used in article 2, and should be retained.

Paragraph 2

33. Mr. PILLAY said that, for the sake of consistency with the amendment proposed to paragraph 1, the words "embodied in the Covenant" should be added after the words "to give effect to the rights" in the first sentence of paragraph 2.

Paragraph 3

34. Mr. CEAUSU said he agreed with the paragraph's main contention that States parties seeking to justify their failure to provide domestic legal remedies for violations of economic, social and cultural rights should have to do so either by demonstrating that such remedies were not "appropriate means" within the terms of article 2.1 of the Covenant, or that they were unnecessary in view of the other means used. However, the whole paragraph would be more convincing if it also included the idea that "appropriate means" were actually vital entities that enabled people to fight for their rights under the Covenant. It was important to state that judicial remedies were absolutely necessary to the full enjoyment of those rights.

35. The CHAIRPERSON suggested adding a further sentence, along the lines: "The Committee considers that in many cases the 'other means' used could be rendered ineffective if not reinforced or complemented by judicial remedies."

Paragraph 4

36. Mr. RIEDEL said that he was happy with the content of the paragraph, but felt that it was expressed in terms that were too negative, for example in its assertion that "international procedural mechanisms ... cannot be seen as effective substitutes for the protection afforded by national courts and tribunals".

37. Mr. MARCHÁN ROMERO agreed. He also felt that the sentence in question did not make clear that States were under an obligation to try to resolve individual claims through the domestic courts before seeking to use the international courts.

38. Mr. TEXIER also endorsed Mr. Riedel's comment, and suggested amending the text to read: "international procedural mechanisms ... can only be a substitute for the protection afforded by national courts and tribunals". That would emphasize the significance of the national courts as first resort, thereby reflecting the view generally held in international law as recently reaffirmed by the International Criminal Tribunal.

39. Mr. CEVILLE said it was his impression that over the past decade the trend in international public law had been for countries to incorporate international legislation into their domestic law. The wording of the paragraph reflected that.

40. Ms. BONOAN-DANDAN felt it was unduly pessimistic to begin the last sentence with "In the absence of a petition procedure", since the Committee's general comment was presumably intended to stand for a considerable time, and the situation with regard to such a procedure might change in the near future.

41. The CHAIRPERSON said he would redraft paragraph 4 to take account of the comments made, and would submit a new formulation to the Committee at its next meeting.

42. Mr. RIEDEL said that care should be exercised in seeking to incorporate the wording of judgements by the International Criminal Tribunal. The Committee formed part of a parallel, but not identical, system.

Paragraph 5

43. The CHAIRPERSON proposed that the words "in domestic law" should be inserted in the third sentence between the words "the obligation to implement the Covenant" and the words "is thus one of result", so as to avoid giving the impression that the Committee regarded all such obligations as obligations of result.

44. Mr. SADI, referring to the second sentence, asked whether it was correct that there was no provision requiring the Covenant to be accorded any particular status in national law.

45. The CHAIRPERSON replied that the key words were "particular status". The Committee did not have the power to recommend to a country that it should implement the Covenant in one way or another. It could only examine the results of its implementation.

46. Mr. MARCHÁN ROMERO said that, rather than state that "the precise method by which Covenant rights are given effect in national law is within the discretion of each State party", the last sentence should emphasize that each State party had a duty to provide the means to ensure that Covenant rights were implemented.

47. Ms. BONOAN-DANDAN agreed with the previous speaker. To speak of "discretion" meant that the Committee would have to take at face value a State's simple assertion that it was implementing a given policy in good faith.

48. Mr. CEAUSU suggested rephrasing the last sentence of the paragraph to read: "Although the precise method by which Covenant rights are given effect in national law is within the discretion of each State party, the means used should be appropriate in that they should produce a result that allows the State party to discharge its obligations". Rather than merely examine the measures described by a State, it was desirable that the Committee should determine whether the means of implementation used were appropriate.

49. The CHAIRPERSON said that, if the Committee agreed, reference could also be made in the paragraph to the Committee's responsibility to review the means used by States.

50. Mr. SADI felt that paragraph 5 was worded too conservatively, in the sense that it did not do justice to the Committee's often expressed view that the Covenant should take precedence over national laws in cases where a conflict occurred.

51. The CHAIRPERSON said he understood that point of view, but considered that it could not be defended in formal terms. The reality was that States did not attribute any particular status to the Covenant. His own country, Australia, gave the Covenant no status at all. While the Committee could comment on the methods used by a State to give effect to the Covenant, it could not contest those means legally.

52. Mr. GRISSA said that the paragraph as currently formulated described the existing situation very well. He saw no reason to change it.

53. The CHAIRPERSON said that, in the light of the comments which had been made, he would redraft paragraph 5 and submit it for the Committee's further consideration at its next meeting.

The meeting rose at 1 p.m.